Nos. 15-2031 & 15-2183
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELLOGG COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

BAKERY, CONFECTIONARY, TOBACCO WORKERS
AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO;
BAKERY, CONFECTIONARY, TOBACCO WORKERS
AND GRAIN MILLERS LOCAL UNION 252-G,

Intervenors.

On Appeal from the National Labor Relations Board
Agency Case No. 15-CA-115259

KELLOGG COMPANY'S REPLY BRIEF

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INTRODUCTION

Despite General Counsel's and the Unions' best attempts to turn the nature of the parties' bargaining relationship on its head, to modify the plain terms of the labor agreements, to obfuscate the facts and issues with "creative semantics" and convoluted arguments, and to distort controlling law, it is the Board's Order that this Court must review and it remains unenforceable for multiple independent reasons.

First, the Court should refuse enforcement under a *de novo* review of the contracts. The Board concluded that the lockout was unlawful solely because it would "effectively" modify an implicit "core workforce" term in the unexpired master agreement, rendering Kellogg's proposals non-mandatory under Section 8(d). (JA 5-6.) The Board and General Counsel describe the alleged improper modification as follows:

> Kellogg's casual-employee and alternative-crewing proposals for the Memphis Supplemental Agreement would modify terms and conditions in the unexpired Master Agreement by permitting Kellogg "to cease hiring all regular employees in the future and replace them with lower paid 'casual' employees," and thereby "stand[ing] th[e] Master Agreement model on its head."

(Resp. at 21 (emphasis added); JA 5-6.)

This alleged modification can occur only if the master agreement requires Kellogg to hire some minimum number of regular employees to perform

bargaining unit work. It doesn't. That conclusion is unassailable based on the Board's findings: "the Master Agreement does not guarantee regular employees any minimum hours of work, overtime, or particular schedules." (JA 5.)

What the Board refuses to acknowledge cannot be disputed. A two-tiered employment framework already exists at Kellogg's cereal plants, with regular and casual employees working side-by-side performing the same work at different wage rates. The master agreement establishes only the wage differential between these two groups. (JA 181, 115.) All other terms, including definitional and work allocation terms, are negotiated locally and included in the local agreements. (JA 36-37.)

Because the local Memphis Agreement was expired, Kellogg had the right to renegotiate casual employee terms in Memphis—including proposing to change the "purpose" or "design[]" of the program and to lift the 30% cap on hiring casual employees under Section 107. (*Id.*) An honest interpretation of the contract language in this case demands the conclusion reached by the ALJ: Kellogg's proposals "were properly the subject of local bargaining; proposals which the Union could have sought to negotiate terms more favorable to regular employees but did not." (JA 22.)

Second, General Counsel cannot escape the Board's complete failure to follow controlling law. The Order relies on an "effective" modification theory

prohibited by *Milwaukee Spring Div.*, 268 NLRB 601 (1984), and selectively refuses to apply its "clear and unmistakable" wavier standard in assessing whether contract language restricts statutory rights to bargain. *East Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139 (6th Cir. 1993). It also exceeds the Board's authority by injecting an implicit and undefined work preservation term into the master agreement where none exists. Doing so improperly interferes with the substance of private bargaining, *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952), and unlawfully forces Kellogg to bargain on a legally permissive basis.

ARGUMENT

I. THE COURT SHOULD NOT BE MISLED BY ATTEMPTS TO DISTORT THE BARGAINING RELATIONSHIP; SETTLED LAW AND THE MASTER AGREEMENT REQUIRED THE UNION TO BARGAIN ABOUT CASUAL EMPLOYEES DURING LOCAL NEGOTIATIONS

All bargaining must occur in Memphis absent voluntary agreement. This holds true as a matter of law and contract. Neither the General Counsel nor the Unions expressly dispute these fundamental points in their briefs. Instead, they attempt to distract the Court from the paramount nature of local bargaining by subtly, yet intentionally, leaving the false impression that the master agreement is the primary contract. It is not. What matters is how the parties' bargaining relationship actually works under their agreements. When understood, that creates an insurmountable barrier to enforcement of the Order.

As a matter of law, all statutory rights and obligations to bargain are tied to the local bargaining unit in Memphis. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass, Co.*, 404 U.S. 157, 164 (1971). Because the Local Union is the exclusive bargaining representative for Memphis employees, Kellogg had the right and the Local Union had the obligation to bargain over all mandatory terms and conditions of employment with respect to the bargaining unit at the Memphis plant.

In contrast, the parties have no legal obligations to bargain anything on a "master" basis. Such bargaining is completely voluntary and legally permissive. *Id.* at 187-88. ("By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining."); *Boston Edison Co.*, 290 NLRB 549, 553 (1998).

Relatedly, as a matter of contract, the parties carefully preserved the primacy of local bargaining in the master agreement. The parties agreed: (1) that the "Master Agreement does not constitute a change in the [local] collective bargaining units . . . and each of the Local Unions will continue to represent the employees" represented by the Local Unions; (2) that the local "'Supplemental Agreements' shall continue in effect as provided in such agreements except as they may be specifically amended or modified by this Agreement"; and (3) that "[the

Master] Agreement shall cover only those matters specifically included herein." (JA 115-16.)

Amazingly, General Counsel glosses over these controlling terms and falsely suggests to the Court that the master agreement is something much more than it is. (Resp. at 4-5.) The most egregious example of this is the selective representation of the language in Section 1.01(f). In describing that provision, both General Counsel and the Unions cite only the first sentence and omit the controlling language highlighted below:

> Those matters which have been covered by provisions in this [master] Agreement shall not, unless the parties thereto agree, be subject to negotiation between the Company and any of the respective Local Unions in an effort to secure changes in or to secure a new [local] Supplemental Agreement. Those matters covered by provisions in a [local] Supplemental Agreement shall not, unless the parties thereto agree, be subject to negotiations between the Company and the International Union in an effort to secure changes in or a new version of this [master] Agreement.

(JA 116; Resp. at 5; Union Br. at 8.)

Ironically, by ignoring this plain language, it is the Board who stands the parties' bargaining model "on its head."

Section 1.01(f) makes clear that the only place that the parties were required to bargain over the definition and use of casual employees was during Memphis negotiations. The casual terms at issue were matters "covered by

provisions in a Supplemental Agreement." Indeed, Kellogg's proposals were literally red-lined versions of Section 107 (JA 228), and the General Counsel's Response acknowledges, as it must, that the "stated purpose" for casuals, their "use," their number being "limited to 30% of the number of regular employees," and all other terms and conditions for the casual employee program are set forth exclusively in Section 107 of the local Memphis Agreement. (Resp. at 8-10.)[1]

II. THE COURT SHOULD REJECT THE BOARD'S ATTEMPTS TO AVOID THE PLAIN MEANING OF THE MASTER AGREEMENT

The Board's contract interpretations are reviewed *de novo*. (Resp. at 15.) This Court applies the plain meaning rule when interpreting labor contracts; it will not look beyond the four corners of the contract in the absence of ambiguity. *Allied Indus Workers v. General Elec. Co.*, 471 F.2d 751, 756-58 (6th Cir. 1973); *Int'l Union UAW Local 91 v. Park-Ohio Indus.*, 1989 U.S. App. LEXIS 8677, *14 (6th Cir. 1989).

A simple application of this rule demonstrates that the Order cannot stand and that the Board is the party improperly modifying the master agreement.

The master agreement prohibits the inclusion of "implicit" contract terms. Under Section 1.01(c), all master terms must be "specifically included"

[1] The Order fails to give effect to the plain meaning of Section 1.01. The Board cannot paper over this fatal crack in the foundation of its decision by resorting to "extrinsic evidence." As detailed in Section II.C, such evidence cannot be considered in the face of unambiguous contract language, and even if it could, it supports Kellogg.

within the four corners of that document. (JA 115.) The Order eviscerates that term by creating an implicit "core workforce" term contained nowhere in the master agreement to support its "effective" modification theory. The Board's "effective" modification conclusion cannot stand because it rests on an oxymoron. No "implied term" can exist in a contract that limits itself to matters that are "specifically included."

The Order also impermissibly modifies Section 1.01(f). Under that Section, "matters covered by the provisions of the Supplemental Agreement" are not required topics during master negotiations. Section 107 of the Memphis Agreement sets forth the definition of casuals and the amount of casuals that may be hired or used to perform the same work as regular employees. To alter the definition of casuals and to expand their use, Section 107 must be modified, and under Section 1.01(f), Kellogg and the Union are only required to bargain over these covered matters during local negotiations.[2] Yet, the Board's Order requires the opposite. It concludes that Kellogg only had the right to bargain changes to Section 107 of the Memphis Agreement during master negotiations. This conclusion is nonsensical and reads Section 1.01(f) out of the master agreement.

[2] Indeed, General Counsel admits that Kellogg "has every right to bargain to impasse regarding casual employees and alternative crewing during local negotiations, so long as the proposals do not modify the existing Master Agreement." (JA 857.)

General Counsel and the Unions do not directly address these straight-forward conclusions because they cannot dispute them. Instead, they make several convoluted arguments in an attempt to justify the Board's failure to apply the contracts' plain meaning. None has merit.

A. Kellogg's Proposals Do Not Modify the Master Agreement's "Express Distinctions" Between Regulars and Casuals

They first claim that Kellogg's proposals—although labeled proposals on casual employees—were in fact proposals to modify wage and benefit terms for regular employees in the master agreement. In support, they argue that Kellogg's proposals "erase all distinctions" between regular and casual employees other than lower pay and benefits, and by doing so modify the master agreement's "express distinction" between regular and non-regular employees. (Resp. at 25, 27; Union Br. 29-30, 32.)

This argument is irrelevant and nonsensical.

It is irrelevant because it misstates the Board's rationale. The Order manifestly relies on the creation of an implied "core workforce" term to support its "effective" modification theory (JA 5-6), not any express distinction between regular and casual employees as the General Counsel contends. This Court reviews only the rationale supplied by the Board, not General Counsel's post hoc characterizations. *Albertson's Inc.v. NLRB*, 301 F.3d 441, 453 (6th Cir. 2002).

But even if it could be considered, this argument is nonsensical. Under this theory, there could be a modification of the master's terms only if the Board can identify distinctions between regular and non-regular casual employees that are: (a) expressly required by the master agreement; and (b) erased or altered by Kellogg's Last Best Offer.

It can do neither. There is one, and only one, distinction between regular and non-regular casual employees required by the master agreement. It is the $6.00/hour difference in pay between the two groups. And there is no dispute that Kellogg's proposals follow this requirement. (JA 181, 229.)

What the Board and the Unions overlook is that, for purposes of the permissive master agreement, the difference in pay rate is the only distinguishing characteristic between regular and non-regular employees. All other distinctions between casual and regular employees, such as limiting the "purpose" for casual employees, establishing the "design[]" for local causal employee programs, or limiting their number "to 30% of the total number of regulars," are negotiated and included in the local agreements. (JA 36-37.)

B. The Last Best Offer Does Not Modify Any Wage or Benefit Terms for Regular Employees

Next, General Counsel argues that Kellogg's proposals would modify the master agreement "by permitting Kellogg 'to cease hiring all regular employees in the future and replace them with lower paid 'casual' employees.'" (Resp. at

21.)[3] He claims that the proposals result in the relabeling of all "new full-time permanent employees" as casuals, and that this would constitute "across-the-board cuts to the wages and benefits that were bargained for newly hired regular employees." (Resp. at 23.) The Unions make a similar argument, that under Kellogg's proposals all new hires in Memphis would receive "permanently reduced compensation and benefits"—"solely because the Company labeled them as 'casuals.'" (Union Br. at 36.)

These arguments represent the true "creative semantics" in this case, and suffer from multiple fatal flaws.

First, they fail because the alleged modification—that all new hires would be casuals and thus no regular employees would receive the wage and benefit terms established for regulars in the master—can occur only if the master agreement requires Kellogg to hire some minimum number of regular employees to perform bargaining unit work. It does not. (JA 5.) Hiring only casual employees simply cannot be a modification of the master agreement because any restrictions are locally determined. Kellogg can hire only casuals right now, so long as it does not exceed the locally-negotiated 30% cap. There also can be no

[3] General Counsel's response does not challenge the fact that Kellogg's proposals do not grant it any greater layoff rights or that the proposals do not permit Kellogg to totally replace regular employees under the unchanged terms in the Memphis and master agreements. (Kellogg Br. at 54-58.)

modification of the Board's imaginary "core workforce" term unless specific limits on hiring casuals are established and exceeded.

Second, these arguments are based on the false premise that casual employees cannot be defined through local negotiations to include employees who are permanent and work full-time hours. The master agreement contains no definitions for regular or casual employees. It recognizes that employees include those "defined in each Supplemental Agreement" (JA 116) and sets no restrictions on how casual employees can be defined locally. In light of this silence, the parties were absolutely free to negotiate these mandatory subjects on a local bargaining unit basis—both as a matter of law and contract.[4]

Third, nothing in the Last Best Offer modifies any wage or benefit terms provided to regulars under the master agreement. Nor can it. Just compare the master agreement terms allegedly being modified with Kellogg's Offer.

Cited Master Agreement Terms	**Impact of Last Best Offer on Cited Master Terms**
"Wage Appendix" (JA 180-81)	None. The new hire progression for regular employees remains unchanged, and the $6.00/hour lower rate for casual employees is preserved. (JA 229.) Regular employees will continue to

[4] The only definition for casual employees is in Section 107 of the Memphis Agreement. General Counsel argues that "the parties could have defined that term in an unusual manner in their contract" but they did not. (Resp. at 25.) This argument is an admission making Kellogg's point. The casual definition can be changed during local bargaining because it is in the expired local agreement.

Cited Master Agreement Terms	Impact of Last Best Offer on Cited Master Terms
	receive this progression.
Wages / Section 5.01 (JA 33)	None. This provision merely incorporates whatever specific hourly wage rates that the parties negotiate in their local agreements. (JA 225-46.)
Overtime / Section 5.04(a) & (b) (JA 148)	None. Kellogg's proposals make clear that regular employees will continue to receive double time for hours worked on Sunday and time and one-half for hours works on Saturday, maintaining the alternative scheduling exception already in the master agreement. (JA 228.)
Hospital, Medical and Life Insurance Benefits / Section 6.01 (JA 150)	None. Regular employees continue to receive the same insurance benefits and casuals continue to be excluded per Section 107 in the prior Memphis Agreement—although Kellogg offered to negotiate benefits. (1675-76, 344, 1651-54.)

Fourth, General Counsel and the Unions refuse to recognize a critical point: a two-tier wage and benefit system already exists at Kellogg's RTEC plants. As such, this case has nothing to do with the contract terms setting the wages and benefits for regular (or even casual) employees. Those terms will not and cannot change under Kellogg's Last Best Offer. This case is about one thing and one thing only: the allocation of bargaining unit work between these two existing groups. The master agreement simply does not speak to the allocation of work

between these groups, and it cannot be modified by the hiring of more—or even all—casual employees because it contains no restrictions on hiring casual employees and no work preservation terms for regular employees.

Finally, these arguments ignore the undisputed facts that the proposals were intended to protect existing regular employee positions by growing the plant and adding production and new jobs. (JA 720, 319-20, 416-17, 514, 720, 1306-12, 1317-18.) Kellogg's projected savings could be achieved only if additional pounds were brought into the Memphis plant. (JA 319-20, 720, 416-17, 1306-12.)

C. Extrinsic Evidence is Not Relevant, But in Any Event it Supports Kellogg's Position

In a third attempt to avoid the plain language of the master agreement, the Board resorts to purported extrinsic evidence. Incredibly, however, it ignores completely the parties' demonstrated course of performance under their contracts—as evidenced by their long, undisputed history of bargaining work allocation terms between regular and non-regular employees at the local level.

Instead, the Board selectively focuses on a few unaccepted contract proposals offered during legally permissive master bargaining in 2005. The Board argues that these unaccepted proposals demonstrate Kellogg's intent for its Last Best Offer to modify terms in the master agreement.

This argument also fails for multiple reasons.

First, there is no basis to examine bargaining history or any form of extrinsic evidence. The contracts are clear and unambiguous. In fact, neither the Board nor the Union has even argued that any ambiguity exists in the relevant master and Memphis agreements.[5] Thus, the Board erred in looking beyond the four corners of the master agreement.[6]

Second, even if extrinsic evidence could be considered, the Board's reliance on rejected proposals made during permissive bargaining is misplaced. Rejected permissive proposals are evidence of nothing—except that the subject matter was not contained in the master agreement and that the parties remained legally obligated to bargain those terms on a local basis. *Boston Edison*, 290 NLRB at 553. Further, Kellogg's decision to make a permissive proposal during master negotiations cannot, as matter of law, transform what is otherwise a

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[5] General Counsel also disavowed this evidence as "parole" or extrinsic evidence—offering it only as "bargaining history context." (JA 1165-69, 1185.)

[6] The Response suggests that the Board can immediately look to extrinsic evidence; this is wrong—even under the Board's own rule. *Contek Int., Inc.*, 344 NLRB 879, 883 (2005) ("Where the contract language is unambiguous [extrinsic] evidence is not only unnecessary but also irrelevant.") General Counsel cites *St. Vincent Hosp.*, 320 NLRB 42 (2006) in support. That case is inapposite. There, the parties reached an oral modification of their agreement that was not reduced to writing—which permitted consideration of extrinsic evidence. *Id.* at 43. Citation to *Don Lee Distrb. v. NLRB*, 145 F.3d 834, 843 (6th Cir. 1998) is no more helpful. *Don Lee* involved consideration of the "totality of circumstances surrounding the agreement" to determine whether certain conduct was unlawful multi-employer bargaining, not the direct interpretation of contract terms. *Id.*

mandatory topic at the local level into a permissive one. *Pittsburgh Plate Glass, Co.*, 404 U.S. at 187-88.

Third, the limited bargaining history cited by the Board supports Kellogg's position. It confirms that there can be no modification of the master because that agreement does not contain any definitions for casual employees or any work allocation provisions or restrictions on their hiring. The parties could have voluntarily negotiated such terms, but they did not.[7] (JA 770-73.)

The Board's reliance on permissive bargaining history also repudiates the important distinction between permissive and mandatory bargaining. The Union was free to refuse bargaining over the casual proposals during 2005 master negotiations because moving those terms from the local agreements to the master was a permissive topic. Because no party can be forced to bargain on an "other than unit" basis, the Board's implicit "core work force" term being imposed on multi-unit basis would be a permissive term which cannot, as a matter of law, support a mid-term modification under Section 8(d). *Pittsburgh Plate Glass, Co.*, 404 U.S. at 185-88; *Oil Chemical & Atomic Workers v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973).

[7] Despite the 2005 proposal to negotiate a casual program into permissive master negotiations, the parties choose to continue bargaining all of these terms on a local basis, adding the Omaha and Memphis non-regular employee programs in 2010. (JA 1599-1613, 1188-89, 1606-13.)

Fourth, it is no answer to claim that the master agreement "first adopted the term 'casual employee' in 1996, against the backdrop of the Supplemental Agreements" that described the purposes of their casual employee programs as relief for regular employees. (Resp. at 26.)

Here again, the Order does not rely on this unsupported rationale—rendering this claim irrelevant. *Albertson's Inc.*, 301 F.3d at 453. But General Counsel's claim is also wrong. The wage provision was added in 1996, and it did not include a definition for casual employees. (JA 181, 1629-30.) Further, there is no evidence that the parties' addition of this relative wage rate had any impact on decades of local bargaining over how to define non-regular employees, how many employees each plant could hire, or how much work they could perform. The record confirms just the opposite. These terms were negotiated locally both before and after 1996. (JA 24.)[8]

D. The Ordinary Meaning of "Casual Employee" is Irrelevant

Finally, the Court can easily reject the Board's belated attempts to rely on the "ordinary meaning" or "common usage" for the phrase "casual employee." (JA 6 at n.12; Resp. at 25.)

[8] The complete lack of evidence to support this argument is further cemented by General Counsel's attempt to elicit false or misleading evidence from a witness trying to suggest that the inclusion of the $6.00/hour lower wage rate for casual employees was added in 2005. (JA 1252-54, 1260-62.)

This argument is a red herring. The Board's theory of violation is predicated on an "effective" modification of the "wage, benefit, overtime, and premium pay provisions" for regular employees. (JA 6.) The Board has never asserted any claim or theory that Kellogg's proposals would modify casual terms in the master. It is undisputed that the definitional and work allocation terms for casual employees are all contained in the local agreements. As General Counsel admitted to this Court: "The [Regional] Director has never asserted that Kellogg's Proposals would modify the master agreement's provisions regarding casual employees." (JA 1119). The Board cannot base its conclusions on theories not advanced in the complaint or litigated. *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1106-08 (6th Cir. 1994).[9]

But even if this argument could be considered, a court may look to the ordinary meaning of the phrase "casual employee" only when that term is not defined by the parties' collective bargaining agreement. *Lewis v. Cent. States*

[9] Any claim that the ordinary definition for "casual" employees was relevant was also waived. The ALJ found that the master agreement did not include definitions for non-regular or casual employees (JA 1630) and sustained relevance objections to questions about their dictionary definitions. (JA 1351.) No party excepted to the exclusion of this evidence or to the ALJ's failure to find that the master agreement included the ordinary or common definition for casuals. *Hovey Elec., Inc. v. NLRB*, 22 Fed. Appx. 509, 515, n.5 (6th Cir. 2001); 29 C.F.R. § 102.46(b).

Southeast & Southwest Areas Pension Fund, 484 Fed. Appx. 7, 8 (6th Cir. 2012).[10] Again General Counsel overlooks a critical fact; the Memphis Agreement defines casual employees. It sets their "purpose," their "design [],"and any restrictions on their hiring or use, which differ from plant to plant. Because that agreement was expired, the parties were free to change that definition however they agreed through local bargaining. *Bennett v. State Farm Mut. Auto Ins.*, 731 F.3d 584, 585 (6th Cir. 2013).

III. THE BOARD'S ORDER IS UNENFORCEABLE BECAUSE IT RELIES ON A PROHIBITED "EFFECTIVE" MODIFICATION

Because the record does not permit the conclusion that Kellogg's proposals would directly modify any master agreement term, the Board's Order relies on an impermissible "effective" modification theory. In holding that effective modifications are not permitted under Section 8(d), *Milwaukee Spring Div.* 268 NLRB 601 (1984) establishes two fundamental principles. First, to prove

[10] General Counsel's reliance on *Lewis* is misplaced. *Lewis* involved a pension service credit dispute. Under ERISA's deferential standard, the court held that the pension fund administrator did not act arbitrarily or capriciously in holding that the plaintiff was not entitled to additional service credit because he failed to prove that he met specific contractual requirements to be classified as a regular employee. *Id.* at 10. The holding was not based on an ordinary definition for casual employees. The key issue was whether the plaintiff worked 30 days within in a 90-day period to be considered "a regular employee" under the CBA terms. *Id.* at 12. In a footnote, the court stated that it may resort to the ordinary meaning of the phrase "casual employee," but only when the parties' contract does not define that term. Here, the parties' "collective bargaining agreement" is both the Memphis and master agreement (JA 115), and the Memphis Agreement defines casuals.

a modification under Section 8(d), the Board must identify "a specific term contained in the contract." *Id.* at 602-04. Second, a modification cannot be based on "implied" terms created from general contract provisions, including wage and benefit provisions. *Id.* Under this controlling authority, the Board cannot "create an implied work preservation clause in every American labor agreement based on wages and benefit or recognition." *Id.*

The Court should refuse enforcement of the Order because it does precisely what *Milwaukee Spring* and federal courts prohibit: it infers a work preservation term for regular employees based on general wage and benefit terms for regular employees in the master agreement. *Id.*; *Boeing Co. v. NLRB*, 581 F.2d 793, 796 (9th Cir. 1978); *Univ. of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975).

It does so without even citing *Milwaukee Spring*. The reason is obvious: application of *Milwaukee Spring* requires the Board to reach a conclusion contrary to its desired outcome. The Board can neither ignore this controlling law nor depart from it without explanation. *UAW v. NLRB*, 802 F.2d 969, 972-74 (7th Cir. 1986).

General Counsel cannot cure this fundamental defect by offering post hoc rationalizations for why *Milwaukee Spring's* well-founded principles should not control. *Albertson's Inc.* 301 F.3d at 453. Nevertheless, his attempts to

distinguish *Milwaukee Spring* are worth addressing because they further demonstrate the weakness of the Board's position.[11]

General Counsel first argues that *Milwaukee Spring* does not prohibit "effective" or indirect modifications under Section 8(d) because "the Board has subsequently found" unlawful modifications based on effective theories after *Milwaukee Spring* was decided. (Resp. at 30.) General Counsel relies heavily on *Link Corp.*, 288 NLRB No. 132; 1998 WL 213934 (1988) to support this argument. (Resp. at 19, 27, 30.)

That case is of no precedential value. It does not even address *Milwaukee Spring*, let alone alter its controlling principles. *Link Corp.* was an unpublished, uncontested case where the employer defaulted by failing to answer the complaint, and where the Board merely adopted General Counsel's position in an unopposed motion for judgment.

But even more troubling is the General Counsel's attempt to mislead the Court by misrepresenting the actual findings in *Link Corp*. Contrary to the General Counsel's claims, *Link Corp.* involved a direct modification. It does not stand for the proposition that effective modifications are permitted under Section 8(d). The *Link* Board found as follows:

[11] Because *Milwaukee Spring* cannot be distinguished, the Unions' amicus brief does not even try.

> About January 1, 1987, the Respondent unilaterally modified the terms of article XXXIII of the agreement by ceasing to make required premium payments and thereby effectively terminating all employee group insurance benefits set forth in that article.

Id. at *5 (emphasis added).

The employer in *Link Corp.* unlawfully modified its contract by failing to pay specific premiums. Although the consequence of that direct modification was the loss of insurance, the Board's contract modification finding had nothing to do with an "effective" or indirect modification theory.

The General Counsel's attempt to distinguish *Milwaukee Spring* on a factual basis also fails. Whether the alleged modification stems from the reassignment of work to a different group of employees under the same contract or from the relocation of work to a group of employees at a different facility is irrelevant. The legal principles do not change and *Milwaukee Spring* rejected this very distinction: "We are also not persuaded that work reassignment decisions and relocation decisions should be treated differently for purposes of determining whether there has been a mid-contract modification within the meaning of Section 8(d)." 268 NLRB at 604.

IV. THE MODIFICATION CASES CITED BY GENERAL COUNSEL ARE INAPPOSITE

The remaining cases cited by General Counsel also involve direct modifications of specific terms that were unquestionably "contained in" unexpired

agreements. None overrules *Milwaukee Spring*. They follow it. Further, none of these cases involved expired contracts where parties sought to renegotiate terms already contained in that expired contract.

- In *C&S Industries, Inc.*, 158 NLRB 454 (1966) the employer unilaterally implemented a new wage incentive for employees in direct conflict with the following unexpired contract language: "there shall be no change in the method of payment of any employee covered by this agreement without prior negotiations and written consent of the Union." *Id.* at 456.

- In *Chesapeake Plywood, Inc.*, 294 NLRB 201 (1989) the employer caused a deadlock in negotiations based on demands that "collided directly" with specific terms in an unexpired EEOC settlement agreement. *Id.* at 210.

- In *Martin Marietta Energy Sys.*, 283 NLRB 173 (1987) the employer unilaterally replaced an existing health insurance indemnity plan in the contract with a HMO plan during the term of an agreement.

- Likewise, in *St. Vincent Hosp.* the employer modified a contract by discontinuing a specific "Advantage Plan" health insurance program that the parties had incorporated by oral modification. 320 NLRB at 42-43.

- *E.G. & G. Rocky Flats, Inc.*, 314 NLRB 489 (1994) involved an employer's unilateral refusal to follow one of three specifically enumerated phases in a training program that was expressly incorporated into the parties' labor contract.

- Similarly, in *Bonnell/Tredegar Indus.*, 313 NLRB 789 (1994), the employer unilaterally modified a specific contract term requiring it to provide Christmas bonuses to all employees

under an established formula. Despite express contract language, the employer took the position that it was "privileged to pay a Christmas bonus of whatever amount it desired." *Id.* at 791.

- In *NLRB v. Ford Bros., Inc.*, 786 F.2d 223 (6th Cir. 1986) the employer failed to pay a contractually required cost of living increase and stopped complying with the agreement's guaranteed 48-hour workweek. *Id.* at 233.

- Finally, in *Stroehmann Bakeries, Inc.*, 287 NLRB 17 (1987) the employer unilaterally changed the wage rate for its wholesale drivers delivering cake products. The contract stated that "[a]ll wholesale drivers shall receive" certain amounts of base pay and contained specific language setting commissions for "all" sales. *Id.* at 19. Unlike the contract in *Stroehmann*, the master agreement does not set a specific wage rate for all employees. Rather, it establishes different wage rates for regular and non-regular employees who may perform the same bargaining work subject only to any locally-negotiated restrictions.

V. THE BOARD'S ORDER IS UNENFORCEABLE BECAUSE KELLOGG HAS NOT CLEARLY AND UNMISTAKABLY WAIVED ITS RIGHT TO BARGAIN OVER HIRING CAUSAL EMPLOYEES

General Counsel next claims that Kellogg's arguments regarding the relevant legal standard for determining whether a matter is "contained in" an agreement under Section 8(d) are "misplaced." (Resp. at 31.) This argument is part of the Board's continuing attempt to impermissibly eschew its "clear and unmistakable" waiver standard—a standard that has applied for more than fifty years. Rather than address Kellogg's arguments or tell the Court what legal standard does apply for determining if a contract term is "contained in" a contract,

General Counsel merely makes the conclusory assertion that there is "no right" to bargain if a matter is "contained in" a contract under Section 8(d).

That assertion begs the question and misrepresents settled law on the applicable standard. The Board and the Supreme Court have consistently held that the parties' statutory rights to bargain under Section 8(d) continue during an agreement absent a waiver. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Provena Hospitals*, 350 NLRB 808, 811-15 (2007). Once those rights are waived by a specific provision, however, Section 8(d) privileges a party from re-negotiating that provision until the parties' agreement expires.

Where, as in Kellogg's case, the question is whether contract language (i.e. the master agreement's "wage, benefit, overtime and premium pay provisions") restricts a party's statutory bargaining rights during the term of a collective bargaining agreement, the Board and this Circuit apply the demanding "clear and unmistakable" waiver standard. *East Tenn. Baptist Hosp.*, 6 F.3d at 1144; *Provena Hospitals*, 350 NLRB at n.17 (the "waiver standard properly takes the Act's policies into account in determining whether a collective-bargaining agreement covers a statutory subject of bargaining").

The disingenuous nature of the Board's continued refusal to acknowledge and apply this standard becomes obvious when considering the volumes of Board decisions where Section 8(d) does not privilege an employer

from refusing to bargain with a union during the term of an agreement in the absence of contract language that meets the Board's "clear and unmistakable" waiver test. *NLRB v. General Tire & Rubber Co.*, 795 F2d 585, 588 (6th Cir. 1986); *California Offset Printers, Inc.*, 349 NLRB 732, 734 (2007); *Mt. Sinai Hosp.*, 331 NLRB 895, 910 (2000).[12] When a union asserts its statutory rights to bargain during an agreement, the Board, without question, will first look to the contract language to see if it meets the "clear and unmistakable" waiver standard notwithstanding Section 8(d). *Id.*

An example highlights the point. In *Hi-Tech Cable Corp.*, 309 NLRB 3 (1992), the contract granted the employer, Hi-Tech, the sole right and authority to "make, change, and enforce reasonable work rules for the efficiency, cleanliness, safety, attendance, conduct, and working conditions" for employees at its facility. *Id.* at 3. Thus, the employer's "right to make . . . reasonable work rules" was explicitly "contained in" the parties agreement and would seemingly meet the requirements of Section 8(d) sufficient to privilege Hi-Tech to refuse to bargain and to unilaterally implement a no-tobacco rule. Yet the union objected, claiming that the contract language granting the employer rights to make reasonable work rules did not constitute a "clear and unmistakable" waiver of the

[12] General Counsel has not sought to change the Board's clear and unmistakable waiver test, nor has the Board explained any deviation from precedent.

union's right to bargain because the language did not expressly reference the subject of tobacco usage in the workplace. *Id.* at 4.

If the Board's position in the instant case is correct, Hi-Tech's refusal to bargain before implementing the rule must have been privileged under Section 8(d). Unlike here, where the Board relies on an implicit term, Hi-Tech's unequivocal management right was expressly "contained in" the unexpired contract. Thus, the union's demand to bargain should have constituted an improper attempt to modify the contract terms governing work rules under Section 8(d). In other words, the union had "no right" to waive.

But that was not the conclusion reached by the Board in *Hi-Tech*. Despite Section 8(d), the *Hi-Tech* Board held that the express written term to make reasonable work rules was insufficient to waive statutory bargaining rights because that term failed to meet the "clear and unmistakable" waiver standard. *Id.*

The Board cannot have it both ways. Application of the waiver standard cannot turn on the identity of the party seeking to exercise its rights. Kellogg is no different than the union in *Hi-Tech*. Both sought to exercise their rights to bargain during the term of a contract that allegedly contained a term restricting those rights. Here, the language in the master provisions cited by

General Counsel "does not even minimally approach that which this Court [has] found to constitute a waiver." *East Tenn. Baptist Hosp.*, 6 F.3d at 1144.[13]

VI. THE BOARD ERRED IN REFUSING TO ADDRESS KELLOGG'S AFFIRMATIVE DEFENSES AND ALTERNATIVE ARGUMENTS

General Counsel does not seriously contest that the Order fails to consider all of Kellogg's relevant affirmative defenses and alternative arguments. Instead, he claims that these defenses are merely "variants" of Kellogg's other points or that the Union had no duty to bargain over casual employees. This is wrong and, if Kellogg's petition is not granted, this Court should remand for the Board to address all of Kellogg's arguments and defenses.

For instance, Board law is clear that to establish the alleged violation, General Counsel must prove that Kellogg insisted on non-mandatory aspects of a contract proposal and that such insistence caused the lockout. *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999). By the Board's own admission, Kellogg was permitted to seek the expansion of hiring and using some casuals in Memphis. Thus, the Union had some duty to bargain over casuals. It failed to do so. The

[13] General Counsel attempts to distinguish *East Tennessee Baptist* because it did not involve an alleged midterm modification. This is yet another unsupported attempt to avoid controlling law. The issue in *East Tennessee* was whether contract language restricted an employer's statutory rights during the term of a labor contract. No matter how hard the Board tries to avoid it, the issue is the same here—whether the master contract terms restrict Kellogg from exercising its statutory bargaining rights.

cause of the impasse was the Union's unwillingness to bargain over any aspect of the casual employee "concept." (JA 221-22).

Next, the Board refused to consider the plain meaning of the Last Best Offer and Kellogg's position that a modification was impossible. Even if the Board had authority to manufacture an implicit "core work force" limit, its Order still fails because the Last Best Offer necessarily incorporates that limit.

> Casual employees shall not be limited in the scope of their work, duties, tasks, hours or in any other terms or conditions of employment except as expressly agreed to by the parties in the Supplemental Agreement or an Applicable Master Agreement. Casual employees may be employed on an indefinite basis, and there shall be no restrictions on Kellogg's right to hire, use, manage or direct Causal employees except as specifically set forth in this Agreement or in any specific provisions on an applicable Master Agreement.

(JA 228 (emphasis added).)

If this Offer was accepted and Kellogg began hiring only casual employees going forward, it would have the contractual right to do so only until it reached any imaginary limit or percentage that the Board might conjure up.

The Board's continued reliance on a handful of bargaining statements by negotiator Kristie Chorny also remains unavailing. A thorough review of the bargaining notes (JA 247-454) demonstrates that these comments are taken out of context. But more importantly, Ms. Chorny's comments are irrelevant. The plain language in the Last Best Offer is unambiguous and it controls. *Idaho Statesman*

v. NLRB, 836 F.2d 1396, 1401 (D.C. Cir. 1987). All of her comments predated the Offer and, in communicating that Offer, Kellogg could not have been any clearer about the proposals' inability to modify any term in the master. (JA 226-27.)

The Union's bad faith bargaining is another defense available to Kellogg that the Board refused to address. *Times Pub'g Co.*, 72 NLRB 676 (1947); *Chalk Metal Co.*, 197 NLRB 1133 (1972). If a "core workforce" restriction in the master agreement actually existed, the Union would have raised that issue during bargaining, and it was required to bargain over casual employees up to the limit imposed by such a term. The Union failed to do so, demonstrating its bad faith.

CONCLUSION

> One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiations. The Act was framed with an awareness that refusals to confer and negotiate [are] one of the most prolific causes of industrial strife.

Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 211 (1964).

The Order repudiates this fundamental purpose. It overreaches in an effort to sanction the Union's refusals to confer and negotiate in good faith and to penalize Kellogg for resorting to a lockout in the face of the Union's obstinacy. Federal courts have consistently criticized and reversed the Board when it denies "the use of the bargaining lockout to [an] employer because of its conviction that

use of this device would give the employer 'too much power.'" *American Ship Building*, 380 U.S. at 317-18. That is exactly what happened here.

The Board's Decision is not supported by fact, law, or logic. It is outcome driven. The Court should grant Kellogg's petition and refuse enforcement of the Order. Allowing it to stand would grant the Board unprecedented power: to rewrite privately negotiated contract terms that it does not like; to ignore controlling precedent without explanation; to apply legal standards selectively to suit the agency's desired outcomes; and to create new, undefined substantive contract terms in every collective bargaining agreement covered by the Act. Congress granted the Board no such powers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and 6 Cir. R. 32(a), the undersigned hereby certifies that this brief complies with the type-volume limitation. The brief was prepared using proportionally spaced font, with serifs, to wit: Times New Roman in 14-point type. This brief contains 6,966 words, excluding the corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, certificate of service, this certificate of compliance and the addenda. The word count was determined using Microsoft Office Word 2010 for Windows. All footnotes were included in the word count.

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, the foregoing was filed through the Court's Electronic Filing System which will send notice to all counsel appearing in this matter.

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